

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BETTY FOWLER, individually, *et al.*,

Plaintiffs,

v.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT, *et al.*,

Defendants.

Case No. 2:09-CV-01062-KJD-LRL

**ORDER**

Presently before the Court is Defendants' Motion to Dismiss for Want of Prosecution (#36/37). Though the time for doing so has passed, Plaintiffs have failed to file a response in opposition. Also before the Court is Defendant Sheriff Doug Gillespie's Motion to Dismiss (#28). Plaintiffs filed a response in opposition (#29) to which Gillespie replied (#32). Finally, Defendants filed a Motion for Judgment on the Pleadings (#30). Though the time for doing so has passed, Plaintiffs have failed to file a response in opposition to the motion for judgment on the pleadings.

Having read and considered the motion, and good cause being found under the Court's inherent power, Federal Rule of Civil Procedure 37, and Local Rule 7-2(d), the Court grants Defendants' motion to dismiss for want of prosecution. Furthermore, even if the Court were to deny the motion to dismiss for want of prosecution, the Court grants the remaining motions to dismiss.

1 Plaintiffs' last action of record in this action occurred on June 21, 2010 when they filed the  
2 Verified Petition for Permission of Attorney Emmanuel C. Akudinobie to Practice Pro Hac Vice  
3 (#34). The Verified Petition was approved and entered by the Court on June 23, 2010. Though  
4 Plaintiffs' response to Defendants' Motion for Judgment on the Pleadings (#30) was due June 27,  
5 2010, Plaintiffs failed to file a response or further participate in the litigation they initiated.

6 Shortly after a telephonic Rule 26(f) conference was conducted on May 18, 2010, Defendants  
7 made their initial disclosures. Plaintiffs then submitted a proposed discovery plan and scheduling  
8 order that did not conform to the Local Rules. On June 10, 2010, Defendants pointed out their  
9 objections to Plaintiffs. On June 16, 2010, the parties continued to communicate regarding the  
10 proposed discovery plan and scheduling order. On June 17, 2010, Defendants communicated with  
11 Plaintiffs seeking Plaintiffs' Rule 26(f) disclosures. Communication about the adequacy of  
12 Plaintiffs' Rule 26(f) disclosures and the filing of an adequate discovery plan continued through  
13 August 4, 2010, when Defendants sent Plaintiffs a letter inquiring why the discovery plan had not  
14 been filed with the Court. Plaintiffs did not respond to the letter.

15 On September 3, 2010, Defendants sent another letter to Plaintiffs detailing Plaintiffs' failure  
16 to communicate in any way with Defendants. Finally, on October 14, 2010, Defendants filed the  
17 present motion to dismiss for failure to prosecute. Plaintiffs have failed to respond. Accordingly, the  
18 Court finds that Defendants' motion to dismiss should be granted due to Plaintiffs' willful failure to  
19 prosecute this action. However, even if the Court were to deny the motion, Defendants' motions to  
20 dismiss on the merits of the case are granted.

21 The action against Sheriff Douglas Gillespie should be dismissed because the allegations of  
22 the complaint contain no allegations sufficient to determine that Gillespie caused any constitutional  
23 violation or was personally involved in the decisions underlying Plaintiffs' civil rights complaint.  
24 See Hansen v. Black, 885 F.2d 642 (9th Cir. 1989)(citing Pembaur v. City of Cincinnati, 475 U.S.  
25 469, 479 (1986)). Plaintiffs' second and third claims for relief for violations of the Fifth and  
26 Fourteenth Amendments are dismissed, because the facts assert pre-trial deprivation of liberty

1 claims. Those claims for excessive force before and during arrest, not after, arise under the Fourth  
2 Amendment. See Albright v. Oliver, 510 U.S. 266, 273 (1994); Bolling v. Sharpe, 347 U.S. 497  
3 (1954); Reed v. Hoy, 909 F.2d 324, 329 (9th Cir. 1989). Plaintiffs' claim under the Americans with  
4 Disabilities Act ("ADA") must be dismissed, because claims against officers in their individual  
5 capacities are not authorized. See EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir.  
6 1995). Furthermore, Title II of the ADA does not apply to officers' ". . . on the street responses to  
7 reported disturbances[.]" Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000). Finally, all of Plaintiffs'  
8 state law claims must be denied, because discretionary immunity applies to the officers' actions in  
9 apprehending the decedent. See Martinez v. Maruszczak, 168 P.2d 720 (Nev. 2007); Butler ex rel. v.  
10 Bayer, 168 P.3d 1055 (Nev. 2007).

11 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss for Want of  
12 Prosecution (#36/37) is **GRANTED**;

13 IT IS FURTHER ORDERED that Defendant Sheriff Doug Gillespie's Motion to Dismiss  
14 (#28) is **GRANTED**;

15 IT IS FURTHER ORDERED that Defendants' Motion for Judgment on the Pleadings (#30)  
16 is **GRANTED**;

17 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendants  
18 and against Plaintiffs.

19 DATED this 9<sup>th</sup> day of March 2011.

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23 Kent J. Dawson  
24 United States District Judge  
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